

A See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP
NO D4–28–294 OF 1994

B NALLINI PATHMANATHAN JC
25 SEPTEMBER 2009

C *Companies and Corporations — Winding up — Liquidators — Directions of court, application for — Liquidator seeking directions of court whether to proceed with sale of shares — Whether court being asked to make commercial decision which should be made by liquidators — Whether directions to be granted — Companies Act 1965 s 237(3)*

D *Companies and Corporations — Winding up — Liquidators — Duties — Fiduciary duties — Sale of shares held by way of tender — Liquidators partners in KPMG — KPMG auditors for successful bidder — Whether liquidators acted in breach of fiduciary duty or in conflict of interest — Whether liquidators guilty of corrupt practice — Whether sale in best interests of company — Whether breach of duty established*

E *Companies and Corporations — Winding up — Liquidators — Leave to proceed, against — Whether court to protect liquidators from spurious or vexatious litigation — Whether sufficient merits to be shown in application for leave*

G Pursuant to the first to 11th petitioners' petition, the first respondent ('the company') was wound up and two liquidators were appointed. Ooi Woon Chee was one of the liquidators. The company owned shares ('KJCFCB shares') in Kian Joo Can Factory Bhd ('KJCFCB'). The majority contributories favoured the sale of the KJCFCB shares, while the minority contributories preferred a pro-rated distribution among the existing contributories. Pursuant to voting held at the contributories meetings, the liquidators decided to sell the KJCFCB shares by open public tender. Amongst others, one Gold Pomelo Sdn Bhd (the private vehicle of the second respondent) and a third party, one Can-One International ('Can-One') put in their respective bids. The liquidators were not satisfied with the offers and requested for improved offers. Revised bids were then presented. Under the terms of the tender the liquidators had absolute discretion to evaluate any offer and to reject any or all offers. The second respondent claimed that Ooi Woon Chee had solicited

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from him a substantial cash consideration to ensure that Gold Pomelo would succeed in its bid. The liquidators accepted Can-One's offer which was the highest offer and a sale agreement was entered into between the company and Can-One. By way of encl 476, the majority contributories sought an order for leave to commence legal action against the liquidators and KPMG Corporate Services Sdn Bhd for breach of fiduciary duty and/or fraud, premised on the allegation that: (i) the liquidators acted in conflict of interest in that Can-One was audited by KPMG and the liquidators who were partners in KPMG failed to disclose this fact; (ii) the execution of the sale agreement was tainted with illegality and consequently null and void due to the alleged corrupt practice of Ooi Woon Chee; and (iii) Ooi Woon Chee had allegedly surreptitiously communicated with the principal officers of Can-One during the tender process. By way of encl 485, the liquidators sought directions of the court.

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Held, allowing encl 485 and dismissing encl 476:

- (1) The court has a duty to protect the liquidator from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding up process in deciding on whether or not to grant leave. Sufficient merits have to be shown and while it does not necessarily follow that a prima facie case must be demonstrated, no specific threshold is set for all cases, as each case must be evaluated and analysed on its own facts. Notwithstanding this mere assertion was insufficient (see para 7).
- (2) The appointment of the liquidators is personal in nature. Sections 4 and 8 of the Companies Act 1965 ('the Act') make reference to persons, not a firm nor a company. As such only Ooi Woon Chee and Ng Kim Tuck were the liquidators, not KPMG. The fact that Ooi Woon Chee and Ng Kim Tuck were partners of KPMG did not make the firm and the company liquidators. They remained separate entities. It could not be said that the liquidators had acted or placed themselves in a position of conflict of interest. The liquidators were not acting at the same time for the majority contributories as well as Can-One 'in the opposite interest'. The liquidators were at all times acting for the company. At best they were in a quasi-trustee position vis-a-vis the contributories (see para 14).
- (3) The final offer from Can-One which was accepted was in the best pecuniary interests of the company. The company enjoyed greater profit as a consequence of the liquidators accepting Can-One's offer. If Gold Pomelo's offer had been accepted, there would have been a loss of RM19m (see paras 22–23).

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- A (4) The allegation of corrupt gratification against the liquidator amounted to bare assertions. The allegation failed to meet the 'sufficient merit' or threshold level required for the grant of leave to commence legal action. The allegations appeared to be made with the intent of wrongfully interfering with the winding up process, namely to derail the sale of KJCFB shares to Can-One (see para 37(a), (b) & (c)).
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- (5) This was not a case where the liquidator was seeking to have the court make a commercial decision which should properly be made by the liquidators. The application under s 237(3) of the Act was well premised. This was precisely the sort of case in which guidance and directions should be afforded (see para 49).
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- (6) To allow the sale to Can-One to be aborted either because of the allegations of impropriety or to pay heed to the wishes of the contributories would be tantamount to the court lending its hand to abort a valid and binding contract on no tenable grounds. This would be entirely contrary to commercial efficacy and the fundamental sanctity of a contract entered into bona fide by both parties. Ultimately the court would be condoning the thwarting of the winding up process which it is entrusted to protect (see para 60).
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[Bahasa Malaysia summary]

- F Berikutan dengan petisyen pempetisyen pertama hingga ke 11, responden pertama ('syarikat tersebut') digulungan dan dua likuidator dilantik. Ooi Woon Chee merupakan salah seorang likuidator. Syarikat tersebut memiliki saham ('saham-saham KJCFB') dalam Kian Joo Can Factory Bhd ('KJCFB'). Majoriti penyumbang bersetuju atas penjualan saham-saham KJCFB, sementara penyumbang minoriti mahukan pembahagian pro-rata di kalangan penyumbang-penyumbang yang masih ada. Berikutan dengan undian yang dijalankan dalam mesyuarat penyumbang-penyumbang, likuidator-likuidator berkeputusan untuk menjual saham-saham KJCFB melalui tender awam terbuka. Gold Pomelo Sdn Bhd (milik peribadi responden kedua) dan pihak ketiga, Can-One International ('Can-One')
- G adalah antara yang membida. Likuidator-likuidator tidak berpuas hati dengan tawaran-tawaran dan meminta untuk tawaran yang lebih baik. Bidaan baru kemudiannya ditawarkan. Di bawah terma-terma tender tersebut, likuidator-likuidator mempunyai budi bicara mutlak untuk menilai sebarang tawaran dan menolak mana-mana atau kesemua tawaran.
- H Responden kedua mendakwa bahawa Ooi Woon Chee telah meminta sejumlah wang daripadanya untuk memastikan Gold Pomelo berjaya dalam bidaannya. Likuidator-likuidator menerima tawaran Can-One yang mana merupakan tawaran tertinggi dan satu perjanjian jualan ditandatangani antara syarikat tersebut dan Can-One. Melalui lampiran 476, penyumbang
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majoriti memohon suatu perintah untuk keizinan bagi memulakan tindakan undang-undang terhadap likuidator-likuidator dan KPMG Corporate Services Sdn Bhd ('KPMG') atas pelanggaran kewajipan fidusiari dan/atau fraud, berdasarkan dakwaan bahawa (i) likuidator-likuidator bertindak bertentangan dengan kepentingan yang mana bahawa Can-One diaudit oleh KPMG dan likuidator-likuidator yang mana merupakan rakan kongsi KPMG gagal mendedahkan fakta tersebut; (ii) penyempurnaan perjanjian jualan tersebut tercemar dengan kepenyalahan undang-undang dan akibatnya batal dan tak sah berikutan dengan tuduhan korupsi Ooi Woon Chee; dan (iii) Ooi Woon Chee dituduh bersembunyi-sembunyi menghubungi pegawai-pegawai utama Can-One semasa proses tender tersebut. Menerusi lampiran 485, likuidator-likuidator memohon arahan-arahan daripada mahkamah.

Diputuskan, membenarkan lampiran 485 dan menolak lampiran 476:

- (1) Mahkamah mempunyai tanggungjawab melindungi likuidator daripada tindakan litigasi palsu atau menyusahkan bagi menghalang gangguan yang tidak wajar dan salah dalam proses penggulungan dalam memutuskan sama ada perlu memberi keizinan atau tidak. Merit yang mencukupi perlu ditunjukkan dan bukanlah satu keperluan bagi satu kes prima facie dibuktikan, tiada standard tertentu yang ditetapkan atas kesemua kes, kerana setiap kes perlu dinilai dan dianalisa berdasarkan fakta-faktanya. Meskipun begitu, penegasan semata-mata adalah tidak mencukupi (lihat perenggan 7).
- (2) Pelantikan likuidator-likuidator adalah bersifat peribadi. Seksyen-seksyen 4 dan 8 Akta Syarikat 1965 ('Akta') merujuk kepada individu, bukannya kepada satu firma atau syarikat. Oleh itu, hanya Ooi Woon Chee dan Ng Kim Tuck merupakan likuidator-likuidator dan bukannya KPMG. Fakta bahawa Ooi Woon Chee dan Ng Kim Tuck merupakan rakan kongsi dalam KPMG tidak menjadikan firma dan syarikat tersebut sebagai likuidator. Mereka tetap merupakan entiti yang berbeza. Tidak boleh dikatakan bahawa likuidator-likuidator tersebut berkelakuan atau bertindak bertentangan dengan kepentingan. Likuidator-likuidator tersebut tidak mewakili penyumbang majoriti dan Can-One pada masa yang sama yang 'in the opposite interest'. Likuidator-likuidator pada setiap masa mewakili syarikat tersebut. Paling tidak pun, likuidator-likuidator tersebut merupakan pemegang amanah quasi vis-a-vis penyumbang-penyumbang tersebut (lihat perenggan 14).
- (3) Tawaran terakhir daripada Can-One yang telah diterima adalah demi kepentingan kewangan terbaik syarikat tersebut. Syarikat tersebut telah menikmati keuntungan yang lebih besar berikutan dengan penerimaan

- A tawaran Can-One. Jika tawaran Gold Pomelo diterima, kerugian sebanyak RM19 juta akan dialami (lihat perenggan 22–23).
- (4) Tuduhan suapan korupsi terhadap likuidator tersebut merupakan penegasan semata-mata. Tuduhan tersebut gagal menepati ‘sufficient merit’ atau standard yang dikehendaki bagi mendapat keizinan untuk memulakan tindakan undang-undang. Tuduhan-tuduhan tersebut kelihatan seperti dibuat dengan niat untuk mengganggu secara salah proses penggulangan tersebut, iaitu menghalang penjualan saham-saham KJCFB kepada Can-One (lihat perenggan 37(a), (b) & (c)).
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- C (5) Ini bukanlah kes di mana likuidator memohon mahkamah membuat keputusan dagangan yang mana sepatutnya dibuat oleh likuidator-likuidator tersebut. Permohonan di bawah s 237(3) Akta adalah tepat. Ini merupakan kes yang mana panduan dan arahan harus diberikan (lihat perenggan 49).
- D (6) Membatalkan penjualan kepada Can-One sama ada disebabkan oleh tuduhan-tuduhan kepenyalahan atau mempedulikan kehendak penyumbang-penyumbang akan menyebabkan mahkamah memberi pertolongan dalam pembatalan suatu kontrak yang mengikat atas sebab-sebab yang tidak berasas. Ini tentunya bertentangan dengan keberkesanan komersial dan asas kesucian kontrak yang ditandatangani secara bona fide oleh pihak-pihak. Akhirnya mahkamah akan membenarkan tindakan menghalang proses penggulangan yang mana mahkamah seharusnya lindungi (lihat perenggan 60).]
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Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1205–1243.

G Cases referred to

- Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor* [2007] 3 MLJ 571; [2007] 7 CLJ 516, HC (not folld)
- Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268, HL (refd)
- H *Chin Ah Keow @ Chin Lai Sitt v Anggun Pintas Sdn Bhd & Ors* [2005] 4 MLJ 747, HC (refd)
- Cobrico Developments Inc v Tucker Industries Inc* 2000 ABQB 766 (refd)
- Deloitte & Touche AG v Johnson* [2000] Vol 1 BCLC 485 (refd)
- I *Ex parte James, Re Condon* (1874) LR 9 Ch App 609 (folld)
- Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors; (Uma Devi d/o R Balakrishnan, third party)* [2003] 6 MLJ 703, HC (refd)
- Mamone & Anor v Pantzer* (2001) 36 ACSR 743 (refd)
- Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, HL (refd)

- Agricultural Industries, Re* [1952] 1 All ER 1188 (refd) **A**
Kian Joo Holding Sdn Bhd (in liquidation), Re; Abdul Jabbar bin Abdul Majid & Anor, applicants [1999] 6 MLJ 352, HC (refd)
Mineral Securities Australia, Re [1973] 2 NSWLR 207 (refd)
Steane's (Nournemouth) Ltd, Re (1949) 66 TLR 71 (refd)
Sanderson v Classic Car Insurance Pty Ltd (1986) 4 ACLC 114 (refd) **B**
Statewide Investments Ltd (in liq) (1982) 6 ACLR 265 (refd)
Presbyterian Church (NSW) Property Trust, The v Scots Church Development Ltd (2007) 64 ACSR 31 (refd)
Yeomans v Walker & Anor (1986) 10 ACLR 753, SC (refd) **C**

Legislation referred to

- Companies Act 1965 ss 4, 8, 218(f), (i), 236(2)(c), 237(1), (3), 273(3), 279
Benjamin Dawson (Izabella De Silva with him) (Iza Ng Yeoh & Kit) for the petitioners. **D**
T Sudhar (Jeremy Lee with him) (Shook Lin & Bok) for the respondents.
VK Lingam (R Thayalan with him) (VK Lingam & Co) for the intervener.
S Suhendran (SY Soh with him) (Kadir Andri & Partners) for the majority contributories.
Sivaparanjothi (Morgan RK with him) (V Siva & Partners) for the liquidator of the first respondent. **E**

Nallini Pathmanathan JC:

- [1] A flurry of interlocutory applications have been filed in this matter as a matter of some urgency. The outcome of all these enclosures is dealt with in this composite decision for clarity, brevity, urgency and essentially because the applications are inextricably interrelated. **F**

SALIENT FACTS

- [2] The background facts of the matter, on which all these applications are premised, are as follows: **G**

- (1) On 9 September 1994 the first to 11th petitioners filed a petition to wind up the first respondent company, Kian Joo Holdings Sdn Bhd ('the company'); **H**
- (2) By a consent order dated 30 January 1996 the court ordered that the company be wound up pursuant to s 218(f) and (i) of the Companies Act 1965. Abdul Jabbar bin Abdul Majid and Ng Kim Tuck were appointed as liquidators of the company to act jointly and severally. By order of court dated 2 October 2007, Ooi Woon Chee replaced Abdul Jabbar bin Abdul Majid. Therefore Ng Kim Tuck and Ooi Woon Chee are the current liquidators of the company. **I**

- A** (3) There are 27 contributories of the company. Broadly they can be divided into two factions. The majority contributories representing 52% in value of the shares of the company comprise the second to fourth respondents and other contributories. This majority faction is led by Dato' See Teow Chuan ('Dato' See').
- B** (4) The minority contributories representing 48% in value of the shares in the company comprise the petitioners and two other contributories. This minority faction of the contributories is led by Dato' Anthony See Teow Guan ('Dato' Anthony').
- C** (5) The company owns 153,868,617 ordinary shares of RM0.25 each ('KJCFCB shares') in Kian Joo Can Factory Berhad ('KJCFCB') representing 34.46% of the total issued and paid up share capital of KJCFCB.
- D** (6) Since the commencement of the winding up proceedings, the liquidators have called for meetings of the contributories to ascertain their views on the method of distributing assets. The two factions put forward two differing views. The majority contributories favoured the sale of the KJCFCB shares, while the minority contributories preferred a distribution in specie (a pro-rated distribution among the existing contributories) of the KJCFCB shares.
- E** (7) At meetings held on 12 July 1996, 8 December 1999 and 10 July 2008 respectively, the majority contributories voted in favour of the sale of the KJCFCB shares while the minority voted against the sale.
- F** (8) As a consequence of the views expressed at these meetings, the last of which was in July 2008, the liquidators decided to, and took steps to sell the KJCFCB shares. The liquidators' decision was challenged by the minority contributories by the filing of legal proceedings which were resolved in 2007 when the Court of Appeal dismissed the application by the minority contributories which sought to revise the decision of the liquidators to sell the KJCFCB shares.
- G** (9) In June 2007 the liquidators put up the KJCFCB shares for sale. Based on the second respondent, Dato' See's offer of RM2.08 per share, which was the highest offer receive the sale was awarded to the second respondent. A share sale agreement as entered into for the sale of 142,133,692 KJCFCB shares representing 32% of the issued and paid up share capital of KJCFCB. It is not in dispute that the said agreement was aborted. The reason was the price, which was high in the context of the then prevailing share market condition.
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- I** (10) As the sale had been aborted, the liquidators again convened a contributories meeting in July 2008 to ascertain once again the wishes of the contributories. The majority contributories again voted in favour of the sale of the KJCFCB shares.

- (11) Accordingly in August 2008 the liquidators put up all the KJCFB shares for sale ('the 2008 sale'). Notwithstanding the second respondent's failure to complete in the earlier sale, he was allowed to participate in the 2008 sale. The sale of the shares was by open public tender. **A**
- (12) The liquidators placed advertisements in the newspapers in August 2008 inviting interested parties to register their interest in the shares. They received expressions of interest from several parties including one Gold Pomelo Sdn Bhd the private vehicle of the second respondent and a third party, one Can-One International ('Can-One'). **B**
- (13) The liquidators then provided to these parties the terms on which the liquidators agreed to supply information relating to the proposed sale of the shares, ('the confidentiality agreement'). Upon acceptance of the terms of the confidentiality agreement the liquidators set out the procedures to be followed by the parties to submit the offer of the purchase of the shares. This memorandum provided, inter alia, that the offers by the parties should be received by the liquidators by 5.30pm on Tuesday 28 October 2008 and that the offer was to be open for acceptance for a period of 90 days from the said date. **C**
- (14) The liquidators varied the deadline for the submission of the offers to 5.30pm on Thursday 27 November 2008 but requested that such offers be open for acceptance for a period of 60 days from such deadline. This kept the conclusion of the tender process within the three month period initially stated. The liquidators maintain that this extension to 27 November 2008 was made to allow offerors to secure financing and submit the best possible offers. No one objected to this extension of the deadline. **D**
- (15) On 27 November 2008 three offers for the purchase of the KJCFB shares were received. According to the liquidators all these offers were opened and witnessed by the liquidators' solicitors. The second respondent, Dato' See was advised that three offers had been received on the said date. **E**
- (16) Can-One's offer was to acquire all the assets and liabilities of KJCFB for RM666,251,679 which was equivalent to RM1.50 per KJCFB share. Dato' See, the second respondent's offer through his private vehicle, Gold Pomelo was for the purchase of 142,200,000 KJCFB shares at RM1.38 per share. And the third offeror offered to acquire 131,424,000 KJCFB shares at RM1.20 per share. **F**
- (17) The liquidators were not satisfied with the offers and requested all offerors for improved offers to obtain the best possible price by 19 January 2009. In this context it is relevant that the liquidators had the absolute discretion under terms of the sale documents and the information memorandum to extend time under section 2, to change or **G**
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- A** terminate the procedures for the 2008 sale, without advance notice as well as the right to deal with one or more selected persons and or to exclude any persons from the sale process under section 6. Finally the liquidators had absolute discretion to evaluate any offer and to reject any or all offers. They were also under no obligation to accept any particular offer whether or not the offer proposed the highest purchase price under section 6.
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- (18) On 19 January 2009, the extended deadline, the liquidators received improved offers, the opening of which was witnessed by the liquidators' solicitors. Can-One improved their offer by giving two options, namely to acquire the assets and liabilities of KJCFB for RM732.9m which is equivalent to RM1.65 per share and a second option for the purchase of 153,868,617 KJCFB shares at RM1.65 per share. The second respondent through Gold Pomelo revised his offer for 133,300,000 KJCFB shares at RM1.48 per share.
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- (19) On 23 January 2009 at 9am a meeting was held between the second respondent, Dato' See, his son, one Jason See and See Teow Koon to discuss Gold Pomelo's revised offer. At the meeting the liquidator requested for an extension of Gold Pomelo's offer up to 20 February 2009. A letter to that effect was issued to Gold Pomelo and is exhibited. In response, Gold Pomelo acting through Dato' See, agreed to an extension up to 6 February 2009. The second respondent also said that he could increase his offer and asked the liquidators to advise him on an acceptable price.
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- (20) The liquidators maintain that arising from the internal discussion it was agreed that Gold Pomelo would be given the opportunity to meet a required price of RM1.68 per share by 25 January 2009. This, according to the liquidators would provide the certainty of a cash sale of the shares to Gold Pomelo as opposed to the options offered by Can-One.
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- (21) Pursuant to this, the liquidator and his agents met up with the second respondent Dato' See, See Teow Koon and Jason See at 4pm the same day, ie 23 January 2009 which was a Friday. Datuk KL Rekhraj, the legal advisor of Gold Pomelo and Mr Piers Willis from Rothschild Malaysia Sdn Bhd, their financial advisor were also present at the meeting. The liquidator, Ooi Woon Chee, maintains that he advised Dato' See that if Gold Pomelo could increase its offer price to RM1.68 per share for the 133,300,000 KJCFB shares, the offer would be accepted immediately.
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- (22) There are two versions with respect to the initiation of the meeting that occurred the following day, ie 24 January 2009. Jason See, the son of the second respondent claims that one of the liquidators, Ooi Woon

- Chee invited him for a private meeting at 7pm on Saturday 24 January 2009 at Restaurant Devi's Corner in Taman Tun Dr Ismail, Kuala Lumpur. The liquidator, Ooi Woon Chee maintains that it was Jason See who called him on the afternoon of 24 January 2009, a Saturday, for a meeting as Jason wished to pass a letter to him personally. A
- (23) Jason See alleges that at this meeting on 24 January 2009, Ooi Woon Chee had solicited that Jason and his father set aside substantial cash consideration to reward Ooi's efforts to ensure that Gold Pomelo would succeed in its bid to acquire the shares. According to Jason See, Ooi told him that the substantial cash payment to Ooi would provide for Ooi's retirement and for his children's overseas tertiary education. Additionally, Jason affirmed that Ooi had assured him that if such monies were paid to him, Ooi would reciprocate by awarding the bid to Gold Pomelo. Ooi is alleged to have stated that he would accept a reduced offer price of between RM1.50 to RM1.58 per share instead of the previous offer of RM2.08 made by the second respondent during the 2007 sale. Ooi claimed to be 'protected' as he was an officer of the court and the other bidders and contributories would have no recourse against him as he could justify his decision, in return for the illegal gratification he sought. B
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- (24) Jason See maintains that he categorically refused to give any such illegal gratification to Ooi. He claims that he told Ooi that the public tender was being carried out unprofessionally and unethically because confidential and price sensitive information was being leaked out to the other bidders. He also complained that the other bidders were being afforded opportunity to improve their offers. Jason contends that he reminded Ooi to carry out the open tender process impartially and fairly. Finally Jason contended that Ooi gave him his mobile phone number and an open invitation to Ooi's residence to discuss the bids and the illegal gratification sought. E
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- (25) Jason See contends that the same subject matter was discussed again at another meeting between himself and the liquidator, Ooi at 9.30am on Monday, 2 February 2009 at McDonald's One Utama, Bandar Utama. These issues comprise the crux of the 'impropriety' allegations leveled against the liquidator, Ooi. H
- (26) The liquidator, contends otherwise. He maintains that the first meeting on 24 January 2009, a Saturday was initiated when Jason See called him in the afternoon and claimed that he wished to pass a letter to the liquidator personally. The purpose was to receive the letter and acknowledge it personally. The letter was from Gold Pomelo, stating that it was unable to take up the offer of RM1.68 per share made at the meeting on 23 January 2009. The liquidator has produced this letter in his affidavit in reply. The letter refers to the meeting on 23 January at I

- A** the liquidator's office and the presence of Gold Pomelo's advisers as above. The letter thanks the liquidator, Ooi for his 'preferential offer to us to buy 30.01% stake in Kian Joo Can Factory Berhad ('KJCFCB') at RM1.68 per share'. It ends by stating that Gold Pomelo is unable to take up the offer. The letter on the face of it shows an acknowledgement of receipt with the words 'Rec'd 24/1/09' and the time is set out there as '7pm'.
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- (27) The second meeting between Ooi and Jason See took place at 9.30am on Monday 2 February 2009 as set out above. In his affidavits, Jason See maintains that the events set out at the first meeting recurred. In short he maintains that solicitation of illegal gratification took place twice, once on 24 January 2009 and again on 2 February 2009.
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- (28) The liquidator however contends that it was Jason See who again contacted him and asked to see Ooi outside his office, as there was something urgent which he needed to speak about. Ooi agreed to do so, provided the meeting was at a location nearby his offices. At this meeting, according to Ooi, Jason See told Ooi that the second respondent, Dato' See was considering making a revised offer of RM1.55 per share through Gold Pomelo.
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- E** (29) On 6 February 2009, four days later, Jason See asked for a further meeting and at that meeting passed the liquidator a letter from Gold Pomelo which increased their offer price to RM1.55 per share for 133,300,000 KJCFCB shares, provided the liquidator accepted such offer on or before 10 February 2009.
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- (30) The liquidator responded by letter dated 10 February 2009 to Gold Pomelo seeking its agreement for the revised offer of RM1.55 per share to remain valid until 20 February 2009. Gold Pomelo agreed to the extension of the validity of the offer until 20 February 2009.
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- (31) On 20 February 2009 the liquidator received confirmation from Can-One stating that it would drop the first option it had proposed and confirming its offer for the acquisition of 146,131,500 KJCFCB shares at RM1.65 per share as per its second option.
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- (32) The liquidators accepted Can-One's offer which was the highest offer as of the deadline. The total consideration payable under Can-One's offer was RM241,116,975 while the total consideration payable under Gold Pomelo's offer was RM206,615,000. The difference in consideration between the two bids was approximately RM19.1m.
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- (33) By letter dated 23 February 2009 the contributories were informed of the award of the sale to Can-One. Gold Pomelo's revised offer of RM1.55 per share was rejected on the same day.

- (34) On 26 February 2009, the solicitors acting for the minority contributories objected to the sale of KJCFB shares as they had taken the position consistently that the KJCFB shares ought to be distributed in specie. A
- (35) On 2 March 2009 and 3 March 2009 respectively the majority contributories made the allegation that the acceptance of the Can-One offer by the liquidator was tainted with fraud and corrupt practice and consequently illegal, null and void. Vide letters dated 4 March and 23 March 2009 the liquidators replied to these letters denying the allegations. B
- (36) On 18 March 2009 the majority contributories commenced Civil Suit No D-22-505 of 2009 ('the first suit') against, inter alia, the liquidators alleging fraud and corrupt practice. C
- (37) A sale agreement dated 23 March 2009 was entered into between the company and Can-One for the sale of 146,131,500 KJCFB shares at RM1.65 per share for an aggregate sale price of RM241,116,975 ('Can-One agreement'). The agreement provides, inter alia, that Can-One may at any time give notice of termination to the company in the event that the company fails, neglects or refuses to complete the sale in accordance with the provisions of the agreement. In such event the company must within seven days refund the deposit together with interest up to a maximum aggregate sum of RM300,000. The only remedy of the parties is as set out in the agreement and neither party shall be entitled to, and will not take any action in law to compel the other party by way of specific performance to complete the sale or purchase of the shares. Neither will either party be entitled to, nor will either party take any action for any loss or damage. D
- (38) On 6 April 2009, the majority contributories, led by Dato' See, the second respondent filed two notices of motion seeking: E
- (a) an order to remove the liquidator; and F
- (b) an order that the majority contributories be granted leave to proceed with the first suit which had been commenced without obtaining leave of court. The first suit has since been struck out. G
- (39) On 20 April 2009 the liquidators convened a fourth meeting of the contributories to formally determine the views of the contributories as to whether the sale of the KJCFB shares to Can-One should be proceeded with. At this meeting, all the contributories voted to abort the sale of the shares to Can-One. H
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- A (40) On 5 May 2009 the liquidators filed an application for directions under s 237(3) of the Companies Act 1965 seeking the court's direction as to whether to proceed with the sale of the KJCFB shares to Can-One.
- B [3] The foregoing comprises a chronology of the factual matrix that forms the substratum of the case. It is within the context of these facts and events that the various applications sought by the various parties has been considered.
- C *The application by the majority contributories for leave to proceed against the liquidators — encl 476 dated 6 April 2009*
- D [4] Vide this motion the majority contributories seek an order that they be granted leave to commence legal action against Ooi Woon Chee and Ng Kim Tuck the liquidators, as well as KPMG Corporate Services Sdn Bhd and KPMG and Can-One International for breach of fiduciary duty and/or fraud. This application is premised on a three fold attack on the integrity of the liquidators as well as KPMG and KPMG Corporate Services Sdn Bhd ('KCSSB'):
- E (a) That the liquidators and thereby KPMG and KCSSB have breached their 'fiduciary' duties and acted in clear conflict of interest in that Can-One International, to whom the successful bid in the 2008 sale was awarded, is audited by KPMG. As KPMG are their auditors, it is
- F contended that the liquidators who are partners in KPMG, failed to disclose this fact prior to or after the tender process. Further it is
- G contended that the liquidators as partners of KPMG have received and continue to receive financial remuneration from Can-One International in respect of such auditing services. This translates to the receipt of pecuniary benefits by the liquidators who are partners of KPMG as a consequence of Can-One International being an audit client of KPMG. The fact that Can-One International is an audit client of KPMG is not in issue.
- H (b) The majority contributories rely on the alleged corrupt practice of the Liquidator, Ooi Woon Chee (as set out above) to maintain that the 2008 sale and acceptance of Can-One's bid followed by the execution of the sale agreement is tainted with illegality and consequently null and void.
- I (c) During the public tender process and prior to the award of the bid to Can-One, Ooi Woon Chee had allegedly surreptitiously communicated with the principal officers of Can-One International and Can-One Bhd and thus conducted himself with gross impropriety, bias and illegality rendering the entire sale fraudulent, null and void.

[5] In response to this application for leave to proceed against the liquidators, they contend that leave ought to be refused because a strong prima facie case must be shown by the majority contributories which does not subsist on the facts here, and pecuniary loss must be suffered by the company which is also not the case here.

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THE LAW

[6] What are the principles upon which leave is granted to commence legal action against a liquidator in the present context? The legal position was considered in *Mamone & Anor v Pantzer* (2001) 36 ACSR 743 where Santow J held as follows:

C

... The applicable principles and their public purpose which underlie the requirement that a prospective litigant must obtain leave to sue a court appointed liquidator can be stated in the following propositions:

D

- (i) The court will protect its officer from spurious or vexatious litigation: *Re Siromath Pty Ltd (No 3)* (1991) 25 NSWLR 25 at p 29; *Re Magic Australia Pty Ltd (in liq)* (1992) 7 ACSR 742 at p 746; 10 ACLC 929 at p 932; and
- (ii) The court will protect the integrity of the winding up process to ensure no wrongful interference with that process: *Sydlow Pty Ltd (in liq) v TG Kotselas Pty Ltd* (1996) 65 FCR 234 at p 241; 144 ALR 159 at p 165–6.

E

To those ends, a prospective litigant must, to obtain the necessary leave, demonstrate its claim has sufficient merit. What is sufficient is affected by the circumstances and timing in which that leave is sought. Moreover courts recognise that liquidators, like administrators, often have to make decisions on the run; to expect perfection in those circumstances is unrealistic. In *Sydlow* above, Tamberlin J stated at FCR 242; ALR 165:

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The discretionary power of the court to grant leave must be exercised having regard to all the circumstances of the particular cases and bearing in mind the need to protect the integrity of its process. *It does not necessarily follow that, in order to obtain leave, a prima facie case must be demonstrated. There is no specific threshold appropriate in all cases, however there must be more than mere assertion. The court's discretion may be exercised on many grounds, including, but not limited to, the sufficiency of the evidence adduced, as to the prospects of success of the action on the application for leave.* (Emphasis added.)

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[7] To summarise, the court is bound to keep in mind its duty to protect the liquidator from spurious or vexatious litigation and to preclude unwarranted and wrongful interference with the winding up process in deciding on whether or not to grant leave. On the facts of any particular case,

- A sufficient merits have to be shown and while it does not necessarily follow that a prima facie case must be demonstrated, no specific threshold is set for all cases, as each case must be evaluated and analysed on its own facts. Notwithstanding this mere assertion is insufficient. The court is at liberty to take into account a variety of factors, including the sufficiency of the evidence adduced and the likelihood of success of the prospective suit. It is evident therefore that there must be a minimum or threshold level of evidence substantiating the claim of a breach of duty to warrant the grant of leave.
- B

- C [8] And locally in *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd & Anor* [2007] 3 MLJ 571; [2007] 7 CLJ 516 Ramly Ali J (now JCA) went further to hold that a prima facie case is required. This is what His Lordship said:

- D ... The control by the court over the circumstances in which, and to the extent to which, its own officers are to be subjected to personal liability in respect of their activities in the course of the performance of their official duties falls clearly within the concept of the protection by the court of its own process (see *Re Siromath* (1991) 1 ACLC 1587). Therefore before leave could be granted, the court must be satisfied that there is sufficient prima facie evidence to support any allegation made against the liquidator. The court finds support in the decision of the High Court in *TN Metal Industries Sdn Bhd v Ng Pyek Yew* [1996] 4 MLJ 567...
- E In *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd* [2005] 2 MLJ 74; [2004] 8 CLJ 584 it was ruled that when misfeasance proceedings are brought, it is necessary for the applicant to not only prove his allegations but also necessitates him to prove pecuniary loss to the company.

- F [9] It is evident from the cases above that the grant of leave cannot be merely cursory. It requires an analysis of the evidence put forward in support of the alleged breaches by the liquidator to ascertain whether such evidence is merely frivolous and vexatious and is in effect bare assertion, or whether it meets a threshold level which warrants categorisation as possessing sufficient merit. In deciding on this issue in any particular case, the court is entitled to take into account a multitude of circumstances and factors. A significant indicator will be pecuniary loss.
- G

- H [10] I have read the cause papers and comprehensive submissions filed by learned counsel for the majority contributories, liquidators, Can-One International, the minority contributories as well as Gold Pomelo Sdn Bhd. Having done so, each of the three pronged matters raised above is considered in turn.

- I *The allegations of a conflict of interest: failure to disclose or suppression of the fact that Can-One International is an audit client of KPMG*

[11] The essence of this allegation of a conflict of interest arises from the

majority contributories' grievance that the liquidators and KCSSB and KPMG placed themselves in a position of conflict of interest because Can-One International, as audit client of the latter entity pays, and they receive and continue to receive pecuniary benefit from it. Additionally, the majority contributories maintain that the liquidators, KCSSB and KPMG suppressed and concealed such conflict of interest in failing to disclose the fact of Can-One being an audit client of KPMG to the contributories when Can-One registered its interest as a bidder, submitted its bid and its revised bids and even when its bid was accepted and the sale agreement entered into. In support of this contention, the majority contributories rely on the case of *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 a decision of the House of Lords which was applied by Zulkefli Ahmad Makinudin J (now FCJ) in *Kayla Beverly Hills (M) Sdn Bhd & Anor v Quantum Far East Ltd & Ors; (Uma Devi d/o R Balakrishnan, third party)* [2003] 6 MLJ 703 at p 708, where it was stated:

... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

[12] And in *Deloitte & Touche AG v Johnson* [2000] Vol 1 BCLC 485 Lord Millett described conflict of interest as follows:

... Their Lordships observe that the expression 'conflict of interest' is an abbreviation for 'conflict of interest and duty'. The rule is that a fiduciary may not without the informed consent of his principal place himself in a position where his interest may conflict with his duty to the principal. The danger is that his interest may affect him in the discharge of his duty to the prejudice of his principal

(see also *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2001] 1 AC 268 at p 280).

[13] These cases deal with the duties of a fiduciary to a client or principal. In the instant case the majority contributories have made what amount to blanket allegations of conflict of interest against the liquidators as well as KPMG, the firm in which they are partners as well as KCSSB. In applying the principles stated in the above cases to the present fact situation the questions that arise for consideration are whether:

- (a) The liquidators have placed themselves in a position of conflict of interest, given that Can-One International is an audit client of KPMG; and
- (b) KPMG or KCSSB have placed themselves in a position of conflict of interest given that Can-One International is an audit client of KPMG.

- A [14] The appointment of the liquidators it must first be noted, as pointed out by learned counsel for the liquidators and Can-One International, is personal in nature, as evidenced by ss 4 and 8 of the Companies Act 1965. Both sections make reference to persons, not a firm nor a company. As such only Ooi Woon Chee and Ng Kim Tuck (a somewhat self-evident fact) are the liquidators, not KPMG nor KCSSB. The latter two entities cannot be appointed liquidators, and the fact that Ooi Woon Chee and Ng Kim Tuck are partners of KPMG does not and cannot make the firm and the company liquidators. They remain separate entities. Given this, can it be said that the liquidators have without the consent of two 'clients' namely the company and Can-One acted for the company while their partners in KPMG have acted for Can-One in the opposite interest? Or that Ooi Woon Chee and Ng Kim Tuck are fiduciaries who have acted at the same time both for and against the same 'client'? It is immediately clear when the question is put this way, in the context of the principles set out in the aforesaid cases, that it cannot be said that the liquidators have acted or placed themselves in a position of conflict of interest. The liquidators were not acting at the same time for the majority contributories as well as Can-One 'in the opposite interest'. The liquidators were at all times acting for the company, as a consequence of which, at best they are in a quasi-trustee position vis-a-vis the contributories (see *McPherson's Law of Company Liquidation* where the learned author states as follows: '... The true position is that, like a director, the liquidator is at most a quasi-trustee with some of the rights, duties and liabilities of a trustee, but really is principally an agent for the company who occupies a position which is fiduciary in some respects and who is bound by the statutory duties imposed by the Corporations Law.') They were not acting for or on behalf of Can-One in this transaction at any time. Can-One on the other hand is an audit client of KPMG and not Ooi Woon Chee or Ng Kim Tuck.
- E
- F
- G [15] In any event as an audit client of KPMG, it cannot be said that Ooi Woon Chee and Ng Kim Tuck are acting for Can-One as well as the company in the opposite interest as described in the *Prince Jefri Al Bokiah's* case. This is because there is no nexus between the audit work done by KPMG for Can-One International and the 2008 sale which deals with the realisation of the assets of the company in liquidation.
- H
- I [16] Turning to the proposition that a fiduciary may not without the informed consent of his principal place himself in a position where his interest may conflict with his duty to the principal and applying it in the factual context here, it means that the liquidators may not without the informed consent of the company place themselves in a position where their interests may conflict with their duty to the company. Their duty to the company is to maximise the realisation of the assets of the company. How have the liquidators placed themselves in a conflict of interest position? By

receipt of pecuniary benefit as a consequence of being partners of KPMG who audit Can-One International's accounts? In other words, did the fact that they, in their capacity as partners of KPMG, who received and continue to receive a part of the remuneration paid by Can-One to KPMG as audit fees, affect or influence in any way their duty to the company to obtain the best possible price for the KJCFB shares? The fact that the liquidators procured the highest possible price available for the KJCFB shares in itself puts paid to this contention. As for KPMG the firm, it is not the liquidator. The individuals Ooi Woon Chee and Ng Kim Tuck are the liquidators. So KPMG and KCSSB cannot and have not placed themselves in any sort of 'position' in relation to the 2008 sale. Neither KPMG nor KCSSB have any nexus with the 2008 sale, nor any duty fiduciary or otherwise to the company. Neither has KPMG nor KCSSB acted 'against' or in the opposite interest of the company by auditing the accounts of Can-One International.

[17] It cannot be underscored sufficiently that Ooi Woon Chee and Ng Kim Tuck were personally appointed as liquidators of the company. The distinction between these individuals and KPMG and KCSSB is crucial in analysing the allegations of a conflict of interest. Such distinction cannot be blurred or obscured so as to bring KPMG and KCSSB into the 2008 sale, or to impose fiduciary positions onto these entities. The fact that the individuals are partners in those entities does not allow for such confusion.

[18] Further as submitted by learned counsel for the liquidators, the liquidators were not personally involved in the activities undertaken by the firm as auditors of Can-One and its parent company. I concur, with respect with the position taken in the Canadian case of *Cobrico Developments Inc v Tucker Industries Inc* 2000 ABQB 766 where it was held in the context of receivers:

... With respect to the alleged conflict of interest, the commercial reality of receiverships is that trustees in bankruptcy, who will act as receivers, receiver/managers, monitors, trustees or as privately appointed receivers are often affiliated with chartered accountancy practices which engage in accounting, audit, consulting, tax planning and a variety of other functions. Trustees in bankruptcy are regulated professionals who in the course of realization of assets may be employing the services of experts, or who may be selling assets to persons, any of whom may have affiliation with the receiver. However, generally that does not constitute a conflict of interest, nor generally does the marketplace of potential advisor or of potential purchasers have any legal standing to interfere with the performance of the receiver.

[19] The general position is applicable here where the facts relied upon by the majority contributories does not suggest or warrant the inference of any form of conflict of interest.

A *Allegations of conflict of interest in the tender process: extension of time and the request for improved bids*

B [20] Here the majority contributories complain that the liquidators breached their duties by acting in favour of Can-One by:

- (a) extending the deadline for the submission of the offer and requesting for an improved offer for the purpose of assisting Can-One to acquire the KJCFCB shares;
- C** (b) failing to reject Can-One's offer which was premised on the acquisition of the assets and liabilities of KJCFCB rather than the shares;
- (c) failing to reject Can-One's offer when there was no financing in place at the time of submission of the offer; and
- D** (d) failing to reject Can-One's offer which was submitted after the deadline on 20 February 2009.

E [21] In so far as the foregoing complaints are concerned, it is relevant that in the information memorandum issued in conjunction with the 2008 sale, the liquidators, acting for the company as vendor, expressly reserved the right at any time to change or terminate the procedures for the sale. This therefore allows for the extension of the deadline for the submission of the offer as well as requesting for an improved offer. The fact that they did so, did not favour

F Can-One, but allowed for all bidders to improve their bids.

G [22] There was also express reservation as to the evaluation of the bids or offers, which allowed the liquidators to consider and evaluate Can-One's offer notwithstanding that it was premised on the acquisition of assets rather than the shares directly. In any event when the improved offers were sent in on 19 January 2009, Can-One provided two options where the second one was for the purchase of the shares at a price of RM1.65. It is therefore inaccurate to suggest that Can-One's offer failed to comply with the requirements of the tender. As for the allegations of a lack of funding, it is significant that at the

H point when the liquidators did accept Can-One's offer, they were satisfied as to this condition, although Can-One did not earlier demonstrate certainty of funding. That is irrelevant as the earlier offers were not accepted. The liquidators at all times retained the discretion whether to accept, reject or further evaluate Can-One's earlier offers and the last is precisely what they

I did. They again cannot be faulted for that. As for the final offer from Can-One which was accepted on 23 February 2009 after the deadline on 20 February 2009, the liquidators on behalf of the vendor possessed the discretion to do so, particularly as it was in the best pecuniary interests of the company (see *Mineral Securities Australia, Re* [1973] 2 NSWLR 207).

[23] The case of *Chin Ah Keow @ Chin Lai Sitt v Anggun Pintas Sdn Bhd & Ors* [2005] 4 MLJ 747 fortifies my conclusion above. In that case the allegation against the liquidators was that they acted illegally by not rejecting the purchaser's tender for failure to comply with the information memorandum; by allowing the purchaser to amend their bid after the closing date and by accepting the amended bid. Ramly Ali J (now JCA) after considering the information memorandum dismissed the application stating, inter alia, that the acceptance of the purchaser's offer was in accordance with the provisions in the information memorandum which provided that the liquidators could negotiate with any tenderer at any time and was not bound to select any one tender. His Lordship further held that there was no evidence of bad faith as the company had gained RM7m by virtue of the sale of the shares to the purchaser. If the liquidators had accepted the plaintiff's tender they would not be acting in the company's best interests. In like manner in the instant case, the company has enjoyed greater profit as a consequence of the liquidators accepting Can-One's offer. If Gold Pomelo's offer had been accepted, there would have been a loss of RM19m and it would have been said that the liquidators were not acting in the best interests of the company or the contributories. The majority contributories have sought to distinguish *Chin Ah Keow's* case by contending that unlike that case there is clear evidence of a conflict of interest and the request for illegal gratification which shows bad faith. The issue of a conflict of interest has been dealt with above and it was concluded that it lacked basis. As for the allegations of impropriety against Ooi Woon Chee they will be dealt with below.

Allegation of impropriety on the part of the liquidator Ooi Woon Chee — solicitation of gratification

[24] From a perusal of the chronology of events above, it is evident that this allegation centres on two meetings between Jason See and Ooi Woon Chee on 24 January 2009 and 2 February 2009. It is in issue whether Jason See sought the meetings or whether Ooi Woon Chee called for them. While this is relevant it is not crucial, as it is the content of the meetings that requires consideration so as to ascertain whether or not these allegations afford sufficient basis or merit for the grant of leave to commence action against the liquidators, bearing in mind, as stated at the outset, the role of the court in protecting the liquidator as an officer of the court and precluding wrongful and unwarranted interference with the winding up process.

[25] Jason See has stated as follows in his affidavits alleging that Ooi Woon Chee solicited him and his father for a bribe:

Paragraphs 9, 10 of Jason See's first affidavit dated 6 April 2009

9. At both these meetings, Ooi had solicited that I and my father set

- A** aside substantial cash consideration to reward Ooi's efforts to ensure that Gold Pomelo succeeds in the bid to acquire the Assets of the Company.
- B** 10. Ooi expressly told me that the substantial cash payment to Ooi will provide for Ooi's retirement and also provide for his children's overseas University education.
11. Ooi had impressed upon me and assured me that if I and my father pay the illegal gratification to Ooi:
- C** (i) Ooi will reciprocate me and my father by awarding the bid to acquire the Assets of the Company to Gold Pomelo;
- (ii) Ooi will accept a reduced offer price of between RM1.50 to RM1.58 per KJCFB share instead of the offer of RM2.08 per KJCFB share made by my father in the previous tender bid
- D** conducted by the Liquidators and that my father See Teow Koon and Gold Pomelo will save over RM70,000,000-00;
- (iii) Ooi told me that since he is an officer of the Court he will be protected by the Court and that the other contributories and/or
- E** the unsuccessful bidders cannot challenge his professional judgment and commercial decision in accepting a lower bid of between RM1.50 and RM1.58 per KJCFB share by Gold Pomelo in return for the illegal gratification solicited by him;
- F** [26] The substance of the allegations against Ooi as deposed to by Jason See in the aforesaid paragraphs are that:
- G** (a) At both meetings on 24 January 2009 and 2 February 2009 Ooi asked that Jason See and his father See Teow Guan 'set aside substantial cash consideration' for him. In return Ooi would ensure that the bid would be awarded to Gold Pomelo;
- (b) This 'substantial cash payment' was for Ooi's retirement and his children's tertiary education.
- H** [27] What then was the liquidator's response to this allegation? Ooi has deposed in his several affidavits that he never solicited any bribe from Jason See or anyone else. Ooi has also gone on record to state (as set out above in the chronology of salient facts) that:
- I** (a) At the meeting on 24 January 2009, following upon the two meetings on 23 January 2009 where Gold Pomelo was asked to increase its offer to RM1.68 whereupon the bid would be allocated to it (there is no dispute as to this), Jason See handed over a letter dated 24 January 2009 to Ooi which contains an acknowledgement of receipt and the time at

7pm. In that letter, the second respondent refers to the 23 January 2009 meetings and regrets that it cannot meet the offer price of RM1.68.

A

- (b) At the meeting on 2 February 2009 Jason See advised Ooi that Gold Pomelo was considering making a revised offer of RM1.55 per share. This oral statement was followed up some four days later on 6 February 2009 when Gold Pomelo did in fact increase its offer to RM1.55 per KJCFB share.

B

[28] In the face of these two seemingly conflicting versions, what should the court do? Should the court simply act on the basis of a cursory reading of these two affidavits, and in the light of the conflicting evidence therein, grant leave to enable legal action to be brought against the liquidator? Or is it incumbent upon the court to undertake an analysis of the evidence before it to ascertain whether there is 'sufficient merit' to warrant the grant of leave? It will be recalled that the latter approach is advocated in the case law referred to above (see *Mamone v Pantzer*, *Abric Project Management Sdn Bhd v Palmshine Plaza Sdn Bhd* and *Sarawak Timber Industry Development Corporation v Borneo Pulp Plantation Sdn Bhd*).

C

D

[29] As such it is necessary to analyse the respective averments of the deponents to ascertain whether there is indeed a threshold level of evidence to warrant the finding that there is merit in the allegation of illegal gratification on the part of the liquidator. In so concluding, I am not applying the higher standard required in *Abric Project Management* where it was held that a prima facie case had to be shown.

E

F

THE ANALYSIS

[30] Stripped to its bare essentials the allegations made against Ooi may be summarised as follows: An oral allegation that he solicited a bribe from Jason See for an unknown amount of cash to be used for his retirement and his children's education.

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[31] In response to this Ooi has stated that he sought no such gratification and that at the meetings which did indeed take place, he was on the first occasion given a letter which he has exhibited, and the contents of which are in keeping with the progress of events. On the second occasion he was verbally informed of Gold Pomelo's intention to make an increased offer, which indeed was done some four days later.

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[32] Ooi's version of events is supported by documents which are consonant with the progress of the tender. This in itself lends weight to his statements on oath.

A [33] Secondly it is telling that notwithstanding such an outrageous and
shocking overture by the liquidator, not only once, but twice, that Jason See
as well as the second respondent did not see fit to react proportionally to such
a serious complaint. No complaint was made albeit formally or otherwise to
B any party after the first meeting. Instead, Jason See went on to meet Ooi for
a second time and significantly to make a revised offer. Why would Jason See
and the second respondent continue to liaise with a corrupt liquidator? Why
would they participate in a public tender which was tainted with corruption,
even going to the extent of increasing their offer? Why would they keep silent
C after two attempts by Ooi, on what were apparently identical terms, seeking
illegal gratification? It is of significance that Jason See states that the substance
of both meetings was much the same in that Ooi asked for a bribe. Jason See
does not attempt to differentiate or set out what happened at each meeting.
He did not even mention the letter of 24 January 2009 which he handed to
D Ooi, nor the fact that he communicated Gold Pomelo's intention to revise its
offer upwards on 2 February 2009. These matters were only clarified by way
of response to Ooi's affidavits subsequently. In short, Jason See's first affidavit
did not provide an accurate and complete account of events at these meetings,
as he failed to allude to these important facts. It is telling that there is no
E quantum stipulated for this 'illegal gratification' sought by Ooi.

[34] It is also significant that no complaint of improper conduct and fraud
was made until about one month later on 2 March 2009 and 3 March 2009
after Can-One had been awarded the sale.

F [35] The timing of the request for gratification is also telling. Can-One's
bid of RM1.65 per share was received on 19 January 2009. On 23 January
2009 the liquidators advised Gold Pomelo that if they made a bid for
G RM1.68 the contract would be awarded to them. In other words, the
liquidator communicated to them that in order to be successful the bid
needed to be in the region of RM1.68. This is not in dispute. That being the
case, it defies logic why the liquidator would the following day ask for a bribe
in order that he could award the contract to Gold Pomelo at the lesser price
H of RM1.50 to RM1.58.

I [36] The other very significant factor to be taken into consideration is that
the alleged corrupt acts of the liquidator have not resulted in any pecuniary
loss to the company. The majority contributories and Gold Pomelo complain
that the bid ought to have been awarded to them, as the liquidator is alleged
to have 'favoured' Can-One. But in the face of the considerably higher offer
made by Can-One, this allegation lacks basis. There might well have been
cause for complaint if the contract had been awarded to Gold Pomelo with
a resultant loss of some RM19m.

[37] The totality of the circumstances including the history of this winding up disclose that it has been fraught with litigation. The liquidators have in the course of the 13 year liquidation, after obtaining the views of the contributories, exercised their discretion to sell the shares. These attempts have been thwarted on each occasion. On this occasion, this allegation of impropriety has been leveled at the liquidator late in the day and after the award of the bid by public tender to Can-One International. The substance and timing of the allegations when considered in the context of the chronology of events as a whole, warrants the inference that:

- (a) The allegations of corrupt gratification amount to bare assertions when stripped to their essence;
- (b) When the allegations are considered together with the response from the liquidator and the documentary evidence in support, the allegations fail to meet the 'sufficient merit' or threshold level required for the grant of leave to commence legal action;
- (c) The allegations appear to be made with the intent of wrongfully interfering with the winding up process, namely to derail the sale of KJCFB shares to Can-One;
- (d) The significant element of a pecuniary loss resulting from the alleged illegal and corrupt acts of the liquidator is missing. Any suit filed would not succeed in the absence of this crucial element. As such the requirement of some prospect of success in the prospective suit is also not met.

[38] One other factor that is relevant is that the majority contributories have also filed a notice of motion for the removal of the liquidators based on the same allegations. This has yet to be heard. If leave is granted, there would be two sets of proceedings premised on the same allegations being heard in two different courts which gives rise to a multiplicity of proceedings.

[39] For the above reasons I concluded that the application for leave to proceed against, inter alia, the liquidators lacks merit. I accordingly dismiss the same with costs. Enclosure 497 is the minority contributories' or the petitioners' application to strike out encl 476. In view of my conclusion it is not necessary to deal with this application and accordingly no order is made on the same. Enclosure 493 is Can-One's application to intervene in encl 476 and oppose the application for leave to proceed against the liquidator and the others. Can-One was accorded leave to intervene previously.

[40] In view of the decision above to refuse leave, Can-One's application is allowed. Finally Gold Pomelo Sdn Bhd as an intervenor, vide encl 506 applies in the alternative for leave to commence legal action against the liquidators

- A as well as KPMG and KCSSB and for the costs of the applications to be borne personally by the liquidators. In view of my conclusions above, this alternative prayer in encl 506 is also dismissed for the reasons set out above. The reasons for this prayer are premised on the same factual matrix of the alleged solicitation of illegal gratification which has been dealt with above.
- B *Application by the liquidators for directions under s 237(3) of the Companies Act 1965 — encl 485*
- C [41] On 15 May 2009, the liquidators filed an application under s 273(3) of the Act seeking directions from the court as to whether the liquidators should proceed with the completion of the sale of 146,131,500 KJFCB shares at a price of RM1.65 for an aggregate purchase consideration of RM241,116,975 to Can-One International Sdn Bhd pursuant to the terms of the agreement dated 23 March 2009. In support of their application the liquidators set out the sequence of events culminating in the execution of the sale agreement with Can-One and the contributories' fourth meeting where 100% of the contributories do not want the sale to proceed.
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- E [42] As may be noted from the sequence of events at the outset of this decision, at the third contributories meeting, 50% in number and 52% in value of the contributories voted for the sale of the entire KJCFB shares while 50% in number and 48% in value of the contributories voted for a distribution in specie of the KJCFB shares. As a consequence the liquidators decided to and did put the KJCFB shares up for sale in 2008 and Can-One's bid at RM1.65 was accepted as the highest bid. Pursuant thereto a sale agreement was entered into as set out above. The contributories however objected to the sale of the KJFCB shares to Can-One. The majority contributories, led by the second respondent made allegations of fraud and corrupt practice against the liquidators with respect to the tender exercise. They also commenced legal proceedings premised on a breach of fiduciary duty, against the liquidators which proceedings were recently struck out as no leave of court was obtained. On 30 April 2009 the liquidators contravened a fourth meeting to ascertain formally the views of the contributories to the sale of the KJFCB shares to Can-One. 100% of the contributories voted to abort the sale to Can-One.
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- I [43] It is relevant that the sale agreement provides that in the event the company fails to perform its obligations under the agreement Can-One is entitled to seek damages of RM300,000 only. Both parties agreed that specific performance was not available under the agreement. It is in this context that the liquidators seek the directions of the court with a view to ascertaining whether they should proceed with, or abort the sale with Can-One.

[44] Prior however to dealing with the request for directions, the initial issue that has to be dealt with is whether the application is an abuse of process as contended by Can-One and to some extent the minority contributories, in that an application for directions under s 237(3) ought not to be utilised so as to ask the court to exercise the discretion which ought to be exercised by the liquidators. This also entails a consideration of whether the nature of the difficulties faced by the liquidators warrants the guidance or directions of the court under s 237(3) of the Act.

[45] Can-One relies on the case of *Kian Joo Holding Sdn Bhd (in liquidation), Re; Abdul Jabbar bin Abdul Majid & Anor, applicants* [1999] 6 MLJ 352 in support of its contention that the application by the liquidators is an abuse of the process of the court. In that case the liquidators sought the approval of the court for the sale of the assets of the company under s 237(3) of the Act 'presently in the liquidators' possession or which come into the liquidators' possession in such manner and on such terms as the liquidators deem to be in the interests of the company as a whole'. It is evident that the liquidators sought approval in extremely broad terms. The High Court concluded that the application '... although couched to be an application pursuant to s 237(3) was in fact not an application for directions under that provision but was instead an application for the court to exercise the discretion which ought to be exercised by the liquidators'. Selenthiranathan J held further that an application for directions under s 237(3) of the Act would entail consideration of the details of how a particular matter arising under the winding up was to be treated, implemented or carried out. He concluded that the liquidators were essentially asking the court to make a commercial decision which was best left in the hands of the liquidators. The learned judge held that 'Just because there was a difference of views amongst the contributories, the liquidators should not be divested of the responsibility of making a decision'.

[46] What then are the criteria in law in relation to an application for directions by the liquidator? The learned author of *Mcpherson's Law of Company Liquidation* summarises the position thus in his textbook:

... In a compulsory winding up the procedure for obtaining the advice of the court is for the liquidator to apply by summons or application under s 479(3) or the inherent jurisdiction for directions in relation to particular matters arising in the winding up. Seeking assistance should not be seen as a sign of lack of ability or incompetence. In fact, a liquidator has a duty to seek directions if there is a difficulty at any stage during the course of the administration ...

This course is so frequently taken that little purpose would be served by attempting a catalogue of all the situations in which such an application may be made. Some examples that may be mentioned are where the liquidator wishes to:

— Know whether to postpone the sale of certain assets;

- A — Institute proceedings for misfeasance;
— Admit a particular debt or claim to proof in the winding up;
— ...
- B Although a direction given on such an application does not amount to a judicial determination raising an estoppel, the advantage of using this procedure is that having obtained and followed the advice of the court with respect to a particular matter the liquidator is then protected against any possible allegations of breach of duty that might subsequently be made against her or him by creditors or contributories of the company on the basis that the proceedings were not properly incurred. In fact the courts have said that in cases of real doubt the correct procedure for a liquidator is to seek directions.
- C Liquidators are not to use an application for directions in at least two respects. First where the liquidator seeks to have the court make a commercial decision for or him; directions on matters that fall within the liquidator's discretion should not be sought where the intention is to enable the liquidator to be absolved of responsibility for making a difficult commercial decision ...
- D By the same token, if a difficulty arises in the course of the administration the liquidator is obliged to inform the court and take directions. For instance a court will give directions where the liquidator's proposed decision is being criticised by a creditor or creditors as being unreasonable or evidence of bad faith. Liquidators have been given directions where they have been confronted with charges of acting unreasonably ...
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- F [47] See also *Statewide Investments Ltd (in liq)* (1982) 6 ACLR 265 which supports the proposition that it is not improper for a liquidator to seek the guidance of the court as to whether or not to postpone the sale of certain assets.
- G [48] In *Sanderson v Classic Car Insurance Pty Ltd* (1986) 4 ACLC 114 Young J categorised the groups of cases where the guidance of the court was sought under an application for directions. One of the categories stipulated was:
- H ... Where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the liquidator has acted *mala fide* or in an absurd or unreasonable or illegal way, see *Re Bayswood Pty Ltd* (1981) 6 ACLR 107 at p 113. Essentially, then though there is wide jurisdiction given to the court under s 379(3) of the Code, it is usually only proper to exercise that power where the matter involves guidance to the liquidator on matters of law or principle or to protect him against accusations of acting unreasonably. The court does not usually consider it proper to intervene and make the liquidator's commercial decision for him. Indeed the court is always reluctant to credit itself with any degree of competence in this field at all ... (Emphasis added.)
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[49] Considering the general principles set out above it is clear that in the instant case, allegations of impropriety, illegality and mala fides have been made against the liquidators by the majority contributories. This does not appear to be a case where the liquidator is seeking to have the court make a commercial decision which should properly be made by the liquidators. This is apparent from the factual matrix of the case. In the circumstances it appears that the application under s 237(3) is well premised, unlike the earlier *Kian Joo's* case. There the liquidators wanted blanket approval for any kind of sale that was implemented. In the instant case however, the public tender exercise and the sale agreement have been executed, and in the face of the allegations of impropriety by the majority contributories, and the wishes of the entirety of the contributories for the sale to be aborted, the liquidators seek the assistance and guidance of the court. It appears to this court on the principles above, that this is precisely the sort of case in which such guidance and directions should be afforded. It cannot therefore be concluded on the factual matrix of this case that the application is an abuse of the process of the court.

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[50] Having so concluded, should the court issue directions to the liquidators to proceed with the completion of the sale to Can-One or should the court advise the liquidators to heed the wishes of the entirety of the contributories and abort the sale? The primary material fact causing the liquidators to consider aborting the sale is the wishes of the contributories to that effect. Section 237(1) of the Act requires the liquidators to have regard to any directions given by the resolution of the contributories or creditors at any general meeting, which may be called by the liquidators.

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[51] In a solvent liquidation, the liquidators are to have regard to the views of the contributories (See *Agricultural Industries, Re* [1952] 1 All ER 1188 where Sir Raymond Evershed MR who held that the persons solely concerned in the matter of the sale of the assets of the company in liquidation were the contributories, as is the case here. He went on to hold that:

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... it would be wrong to deny to the persons really concerned an opportunity, if they wish to do it, even of throwing good money after bad. It is for them to decide ...

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[52] In short the wishes of the contributories is of considerable significance and the liquidators are bound to have regard to their wishes. In *Yeomans v Walker & Anor* (1986) 10 ACLR 753, it was held in relation to this issue:

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... It appears from s 237 of the Companies Act that a liquidator must have regard to the directions given by the resolution for the contributories at a general meeting. If such a resolution is made, it seems to me that the liquidator is required, not merely entitled to take such a resolution into account as something having independent weight ...

- A [53] The liquidators cite the fourth contributories meeting as posing difficulties with their pursuing the sale agreement with Can-One in view of the contributories' wishes to abort the sale, a matter to which they must have regard. On the other hand the liquidators are bound to act fairly and justly in accordance with the rule in *Ex parte James, Re Condon* (1874) LR 9 Ch App 609. In the case of *Presbyterian Church (NSW) Property Trust, The v Scots Church Development Ltd* (2007) 64 ACSR 31, the court had occasion to consider the duty of liquidators and held as follows:
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- C ... the court keeps control over liquidators and gives administrative directions to them. Where property is in the hands of a liquidator has been paid for, in whole or in part, by the claimant, even though the claimant has no legal or equitable right to the property or to prove in the liquidation, it may be unfair, not only in cases where money has been paid to a liquidator by mistake of law, for a liquidator to continue to take the benefit of property, at least without bearing the burden. To deal with this situation, the court will give such directions to the liquidator as will ensure he or she deals justly with all parties.
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[54] In *Steane's (Nournemouth) Ltd, Re* (1949) 66 TLR 71, Vaisey J stated:

- E ... Each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of good faith and honest intention of the persons concerned), and the court is free to act according to the judge's opinion of what would be just and fair in each case ...
- F [55] There is therefore a clear conflict between the views of the contributories as a result of the fourth contributories meeting held in April 2009, after the tender exercise and after the sale agreement with Can-One had been executed, and the duty of the liquidators to act in good faith and fairly and honestly given their commitment by way of contract with
- G Can-One. Given these two conflicting positions which option is to be adopted?

- H [56] In the view of this court, it is erroneous for the liquidators to seek to meet the views of the contributories expressed at the fourth contributories meeting and balance that against the need to be fair and just to Can-One. The law clearly stipulates that the liquidators are bound by statute to have regard to the wishes of the contributories. But the crucial issue is when. At what point are the liquidators to give weight and significance to the wishes of the contributories? The answer to that must be, at the point in time when
- I they are deciding how to deal with the assets of the company. In the instant case that decision, namely how to realise or deal with the assets of the company, was made after the third contributories' meeting on 10 July 2008 prior to the 2008 sale. At that meeting the majority of the contributories voted to proceed with a sale of the shares rather than by way of distribution

in specie. The liquidators took the wishes of the contributories into account, as they are legally bound to do, when they decided to proceed with the 2008 sale by way of public tender. The liquidators therefore exercised their discretion to sell, which they were fully entitled to do, at that stage. All matters that followed thereafter are a consequence of the exercise of their discretion or decision to sell.

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[57] As a consequence the public tender was held and the highest bid accepted. Thereafter a sale agreement was executed with Can-One. How then can the fourth contributories meeting occurring well after all these events be given credence when the liquidators had already made a decision to sell after taking account of the contributories' wishes in 2008?

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[58] The minority contributories who have consistently maintained that there should be no sale of the assets or shares, state that it is not too late for the contributories' wishes to be taken into account in view of the serious allegations of impropriety and illegality made against the liquidators. They submit that these allegations, which require investigation, afford a change in circumstances giving rise to the decision of the liquidators to ascertain once again the wishes of the contributories.

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[59] I considered this submission and at first blush the option of adopting the contributories' views and aborting the sale appeared attractive. This was particularly so as the sale agreement precluded Can-One from seeking specific performance and limiting the damages to RM300,000. However after examining the entire factual matrix of this case and having given the matter more mature consideration I determined that to pursue this option would be fallacious for the following reasons:

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- (a) The liquidators are empowered under s 236(2)(c) of the Act to use their discretion when selling the shares;
- (b) The liquidators (as set out above) had already convened a meeting on 10 July 2008, the third contributories meeting to ascertain the wishes of the contributories on the realisation of the assets of the company. Following the majority vote, the liquidators exercised their discretion and decided to sell the shares by way of a public tender exercise which commenced in August 2008;
- (c) Pursuant to the sale by public tender, the liquidators accepted Can-One's bid as it was the highest and entered into a contract with Can-One for the sale of those shares;
- (d) The views of the contributories at the fourth meeting on 30 April 2009 ought not to be used to thwart the winding up process, in view of the fact that it was the majority contributories in the first instance who had

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- A** voted for a sale of the assets. Their views, at this stage have become irrelevant because the liquidators had already acted after taking into account their wishes earlier;
- B** (e) The allegations of impropriety of the liquidators (which has been dealt with above) which I have concluded lack merit, do not, in the circumstances constitute a change in circumstances rendering the entire sale by public tender null and void. In this context it cannot be open to the liquidators to vary or review their decision to sell the shares simply because the contributories have decided to change their minds;
- C** (f) This is particularly so, when it is considered that it was the majority contributories who initially insisted on a sale of the shares, and when they found that the shares would be purchased by a third party, promptly changed their minds and sought to abort the sale by alleging impropriety and illegality. The only inference that can be drawn from their conduct thus far is that they seek to thwart the sale and the winding up process in an effort to procure the KJCFB shares at a price suited to them. This is evident from the application of Gold Pomelo, the second respondent's private vehicle which has sought claim that the sale agreement with Can-One be held to be null and void and for the bid to be awarded to them as the second highest bidder in the sale by public tender.
- E**
- F** (g) This liquidation which has been ongoing for some 13 years has spawned some considerable litigation and will, no doubt continue to do so. Aborting the current sale agreement with Can-One will leave the winding up process in no better position because the parties will be set right back to square one with a vote being taken on how to proceed with the realisation of the assets of the company.
- G** [60] An important and significant factor in this application for directions is the duty of the liquidator to act justly and fairly in keeping with the rule in *Ex parte James*. It would be less than tenable for this court to condone any act on the part of the liquidators which would amount to a breach of contract, simply because the liquidators are placed in some difficulty by reason of the allegations of impropriety and illegality leveled against them by the majority contributories. To allow the sale to Can-One to be aborted either because of the allegations of impropriety or to pay heed to the wishes of the contributories at the fourth meeting would be tantamount to the court lending its hand to abort a valid and binding contract on no tenable grounds.
- H**
- I** This would be entirely contrary to commercial efficacy and the fundamental sanctity of a contract entered into bona fide by both parties. Ultimately the court would be condoning the thwarting of the winding up process which it is entrusted to protect. For these reasons it appears that the liquidators are entitled to directions as per prayer 1 of encl 485, namely to proceed with the

completion of the sale of 146,131,500 ordinary shares held by the company in Kian Joo Can Factory Bhd at RM1.65 per share for an aggregate purchase consideration of RM241,116,975 to Can-One International Sdn Bhd.

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[61] As a consequence Can-One's application in encl 500 opposing the liquidator's application for directions is dismissed. It's alternative prayer that the liquidators be directed to proceed with the sale agreement between itself and the company is allowed.

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Enclosure 506 — Gold Pomelo's application to intervene and reverse or terminate the sale agreement between the company and Can-One International

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[62] In encl 506 Gold Pomelo has sought to intervene in the application for directions by the liquidators seeking:

- (a) a declaration that the bid/offer by Can-One is invalid, null and void;
- (b) that the decision of the liquidators to award the bid to Can-One be reversed pursuant to s 279;
- (c) that the sale agreement between Can-One and the company be terminated or cancelled; and
- (d) that the court direct the liquidators to award the bid for the purchase of the shares to Gold Pomelo pursuant to s 279 of the Act.

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[63] The grounds of this application are premised on grounds similar to that for leave to bring legal action against the liquidators. As this issue has been dealt with exhaustively previously, I adopt the reasons therein to refuse the reliefs sought by Gold Pomelo. As I have earlier concluded in the directions application in encl 485 that the liquidators are advised to proceed with the completion of the sale agreement between the company and Can-One International, it follows that Gold Pomelo does not succeed in its application which is dismissed in its entirety. As a consequence encl 523, Can-One's application to intervene and oppose Gold Pomelo's application in encl 506 is allowed.

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Enclosure 485 allowed and encl 476 dismissed.

Reported by Kanesh Sundrum

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